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WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

Engaging in the interactive process

Obligations under New York law

The extent to which an employer must engage in the "interactive process" with an employee who alleges a disability and requests a reasonable accommodation under the Americans with Disabilities Act has been the topic of numerous federal court decisions.

Until recently, there has been little guidance with respect to an employer's similar obligations under New York law. A recent decision by the New York Court of Appeals attempts to clarify those obligations, holding that an employer's failure to engage in the interactive process will bar summary judgment.

Although the court's decision limits an employer's access to dispositive relief, it leaves open the question of how much "engagement" between employer and employee is necessary. Moreover, the court does not address the extent to which an employer can still obtain summary judgment by offering a legitimate, non-discriminatory basis for the alleged adverse action.

By SARAH MERKEL
Daily Record Columnist

Protection against employment discrimination on the basis of disability under New York Law

The New York Human Rights Law protects applicants and employees from discrimination on a variety of bases, including discrimination on the basis of disability, NY Executive Law § 296(a). An employee can seek administrative review of his or her claim by filing a timely complaint with the New York Division of Human Rights, or bypass the DHR and file a complaint in New York Supreme Court, *id.* at §§ 297 (1) & (9).

The term "disability" under the statute is limited to "disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held," *id.* at § 292(21).

Unless an employee alleges discrimination based on membership in some other protected class, an employee who cannot, with the benefit of a reasonable accommodation, perform the essential functions of his or her job is unprotected by the statute. Similar to the ADA, a "reasonable accommodation" under the HRL does not include accommodations that would "impose an undue hardship" on the employer, *id.* at 21-e.

The New York HRL and the 'interactive process'

Must an employer engage in the interactive process with an employee if his requested accommodation suggests that he cannot perform the essential functions of his job? According to the New York Court of Appeals' recent decision in *Jacobsen v. New York City Health and Hospitals Corp.*, the answer to this question is a qualified "yes." Dismissing such a request out-of-hand can foreclose dismissal at the summary judgment stage on an employee's disability claim, 2014 NY Slip Op. 2098 (March 27, 2014).

Plaintiff William Jacobsen was a health facilities planner with the New York City Health and Hospitals Corporation. His duties included visiting construction sites, reporting on those site visits and performing other necessary office work. Jacobsen's health and employment difficulties escalated when he was reassigned to oversee projects at the Queens Hospital Center, which involved frequent construction site visits, and the relocation of his office to that hospital center.

Prior to this transfer, the plaintiff had been diagnosed with a form of pulmonary dysfunction. After his transfer, he was diagnosed with pneumoconiosis, described by the court as "an occupational lung disease" related to "prolonged inhalation of asbestos or other dust particles," *id.* at 2.

Following this diagnosis, the plaintiff initially requested a three-month medical leave of absence. His physician at the time indicated that Jacobsen could not perform his usual work duties, nor could he be exposed to "inhaled dusts." Roughly three months later, his union representative requested, on Jacobsen's behalf, a "reasonable accommodation" allowing Jacobsen to perform tasks in the office, as opposed to at construction sites.

Jacobsen was not reassigned, but in March 2006, he was cleared to return to work, provided that he was not exposed to environmental dust. Jacobsen requested a specific industrial respirator, but the employer provided him with only a dust mask, which he used infrequently. Although he performed his regular duties, he experienced additional respiratory complications.

Continued ...

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Continued ...

Jacobsen's health worsened, prompting him to request a transfer back to his previous location, at the employer's main office. Attached to this request was a letter from a different physician, which recommended that Jacobsen exercise his duties in a setting free from "airborne irritants or fibrogenic dusts," *id*. at 3. In an apparent rejection of this request, the employer determined that his job responsibilities required him to spend at least 80 percent of his time in the field.

Jacobsen then filed a disability discrimination claim with the New York DHR. Two days later, the employer placed him on a six-month unpaid medical leave, offering him the opportunity to return after his medical condition improved. Jacobsen ultimately obtained a voluntary dismissal of his administrative complaint, and filed suit in New York State Supreme Court.

Following discovery, the employer moved for summary judgment dismissing the complaint, including Jacobsen's claims under the HRL and the New York City Human Rights Law (The New York City Human Rights Law differs substantially from the HRL in that an employee can establish a prima facie case of discrimination based solely on his level of impairment. The employer must then, as an affirmative defense, demonstrate that the employee cannot, with a reasonable accommodation, perform the essential functions of his job. Given this differing standard, the NYCHRL will not be discussed in this article).

The Supreme Court granted the employer's motion, determining that there was no reasonable accommodation that would allow Jacobsen to spend time at any construction site. Therefore, he could not perform the essential functions of his job. The Appellate Division, First Department, affirmed the court's order, with one justice dissenting.

The Court of Appeals began its analysis by setting forth the criteria for an employee's prima facie case of discrimination on the basis of disability. An employee must show that he "suffers from a statutorily defined disability," in other words, a disability which, if reasonably accommodated, would not prevent the employee from performing his job duties, *id*. at 7. The employee must also show that this disability "caused the behavior for which the employee was terminated," *id*.

Although it is the employee's ultimate burden of proof to establish his prima facie case at trial, including the existence of a reasonable accommodation, this does not obviate the employer's obligation to engage in the interactive process. If an employee requests "a specific accommodation for his or her disability, the employer must give individualized consideration for that request and may not arbitrarily reject the employee's proposal without further inquiry," *id*. at 9.

As a result, an employer normally cannot establish entitlement to summary judgment unless "the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation," *id*.

Citing to federal case law holding that a proposed reasonable accommodation "triggers" a duty to explore the request, the court found that "the employer must show that it engaged in a good faith interactive process that assessed the needs of the disabled individual and the reasonableness of the accommodation requested," *id*. at 9-10 (quotations and alterations omitted).

In short, an employer who simply foregoes engaging in the interactive process risks forfeiting its right to summary judgment.

Implications of the 'Jacobsen' case for potential litigants

Jacobsen clearly requested a specific accommodation, and the court's recitation of the facts suggests that the employer largely failed to respond. Employers should take care to at least respond to and further engage with an employee who requests an accommodation.

Unfortunately, given the facts, the *Jacobsen* court offers little guidance as to the necessary level of employer response and engagement. This lack of guidance notwithstanding, documenting the interactive process as well as the foundation for any determination can only serve to buttress an employer's claim to dispositive relief.

Buried within the *Jacobsen* decision lays a cautionary tale for the eager plaintiff. Jacobsen sought a voluntary dismissal of his administrative claim before the New York DHR. The DHR and the Equal Employment Opportunity Commission are parties to a work-share agreement that allows a DHR complainant to dually file his complaint with the EEOC and thus, preserve his federal claims. Yet it does not appear that Jacobsen availed himself of this opportunity.

Presumably, Jacobsen either failed to file a dual claim or sought an administrative dismissal before the EEOC made its determination or issued a notice of right-to-sue letter. Some six-years later, Jacobsen sought EEOC review and then filed a pro se complaint in the Southern District of New York, alleging causes of action that included a claim under the ADA. This claim was dismissed as untimely, *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 2013 U.S. Dist. LEXIS 122448 (S.D.N.Y. Aug. 28, 2013).

Jacobsen's federal filing may well have been motivated by the dismissal of his state claim and the First Department's subsequent denial of his appeal. His failure to pursue a federal claim may have been purposeful and fueled by the panoply of damages, including attorneys' fees, available under New York City's HRL. However, whether Jacobsen's waiver of his ADA claims was intentional or unintentional, it was a decision he later regretted.

Finally, it is important to note that HRL claims are frequently litigated in federal court, as state law claims pendent to federal

Continued ...

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Continued ...

discrimination claims. Federal courts uniformly apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972), to both ADA claims and claims under the HRL. New York state courts have also applied this framework in the summary judgment context, see, e.g. *Koester v. N.Y. Blood Ctr.*, 55 A.D.3d 447 (1st Dep't 2008).

McDonnell Douglas dictates that once an employee establishes a prima facie case of discrimination of on the basis of disability, the employer can rebut this showing by establishing that there was a legitimate, non-discriminatory reason for the alleged adverse employment action. If the employer meets this burden, the plaintiff must come forward with sufficient evidence to permit the trier of fact to conclude that the proffered reason is actually a pretext for discrimination.

The *Jacobsen* court did not directly address this standard, instead focusing on the employee's prima facie case. Indeed, in a footnote discussing the evolution of Second Circuit precedent on the import of the failure to engage in the interactive process, the court noted that under the HRL, "the lack of an interactive process is relevant primarily to the issue of whether a reasonable accommodation was available ... and does not substantially impact the court's or the fact finder's determination of causation," 2014 NY Slip Op. 2098, p. 11, n. 2. As a result, the court has arguably not foreclosed all avenues for summary judgment where an employer has failed to engage in the interactive process, only those avenues attacking the plaintiff's prima facie case.

Conclusion

The ultimate impact of the *Jacobsen* court's decision remains to be seen. State HRL determinations are frequently unreported at the Supreme Court level and addressed only in a summary fashion before the Appellate Division. Where an employee files an agency complaint and the DHR issues a determination and order, the Supreme Court's review is generally limited to a determination of whether the agency's findings are supported by substantial evidence.

In contrast, widespread electronic availability of federal decisions, regardless of whether those decisions are officially "reported," leads to a plethora of federal precedent interpreting both federal law and pendent state HRL claims. As a result, it is probable that the impact of the *Jacobsen* court's decision will be shaped at the federal level. The likely result is a continued convergence of the standards under the HRL and the ADA.

While federal precedent is instructive, only developed guidance from the Appellate Divisions or the Court of Appeals can provide litigants with an authoritative interpretation of New York law. Unfortunately, such guidance is frequently sparse.

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